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HB490

TO: The Honorable Members of the Senate Judiciary Committee
FROM: Dan McGee, Private Citizen, Laurel, Montana 406-628-6534, 628-8101, 855-0046
DATE: April 4, 2011
SUBJECT: Response to certain issues regarding HB 490 (Warburton) – Personhood Amendment

During the Hearing on HB 490, Representative Wendy Warburton, some questions were asked regarding the sworn duty of a Legislator to protect and defend the US & Montana Constitutions and about the Initiative and Referendum processes.

Please permit me to present for your consideration some excerpts from the Montana Constitution, some quotes by some important folks, and some personal observations and opinions.

MONTANA CONSTITUTION – excerpts:

Article II, Section 1: Popular Sovereignty: *“All political power is vested in and derived from the people. All government of right originates with the people, is founded upon their will only, and is instituted solely for the good of the whole.”*

Article II, Section 2, Self-government: *“The people have the exclusive right of governing themselves as a free, sovereign, and independent state. They may alter or abolish the constitution and form of government whenever they deem it necessary.”*

Article III, Section 5: Referendum. *“(1) The people may approve or reject by referendum any act of the legislature except an appropriation of money. A referendum shall be held either upon an order by the legislature or upon petition signed by at least five percent of the qualified electors in each of at least one-third of the legislative representative districts....”*

Article III, Section 1. Separation of Powers. *“The power of the government of this state is divided into three distinct branches – legislative, executive and judicial. No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted.”*

Article V – The legislature, Section 1. Power and Structure. The legislative power is vested in a legislature... The people reserve to themselves the powers of initiative and referendum.

- Thomas Jefferson – in a letter to Abigail, Adams, September 11, 1804, following the Marbury v Madison decision by the US Supreme Court:
Nothing in the Constitution has given them (the federal judges) a right to decide for the Executive, more than to the Executive to decide for them... But the opinion which gives to the judges the right to decide what laws are constitutional, and what are not, not only for themselves in their own sphere of action, but for the legislature and executive also, in their spheres, would make the judiciary a despotic branch.” [please note that Jefferson, among other things, was a lawyer, legislator, Governor, Secretary of State, Vice President, President and, most importantly, a surveyor!].

- Abraham Lincoln, First Inaugural Address, March 4, 1861, commenting on the US Supreme Court's decision in the Dred Scott v Sanford case, which 'ruled' that slaves were not persons or citizens, but were "chattel" property:

I do not forget the position assumed by some that constitution questions are to be decided by the Supreme Court...At the same time, the candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme court, the instant they are made...the people will have ceased to be their own rulers, having...resigned their Government into the hands of the eminent tribunal...Intelligence, patriotism, Christianity, and a firm reliance on Him who has never yet forsaken this favored land, are still competent to adjust in the best way all our present difficulty."
[please note that Lincoln, was a lawyer, legislator, President – and, like Jefferson, a surveyor!].

Conclusions, Observations & Thoughts:

1. The People of Montana have the exclusive right to amend their Constitution – no branch of Government can amend the Constitution under its own power or authority.
2. The question before the Senate Judiciary Committee is whether to forward HB 490 (Warburton) to the full Senate for it's consideration.
3. The question before the Senate will then be whether to forward a Referendum (per our Constitution) to the People of Montana - in their position as the exclusive authority charged with right to amend the Constitution - for their consideration.
4. The question for the People will then be to decide whether or not to amend their Constitution with the policy concept/principle that a person is a person at conception.
5. The duty of the Legislature is act on behalf of the People they represent to establish the policies of Government via the process of making law and within the bounds of the Constitution.
6. In exercising those legitimate duties, the Legislature is, from time to time, called upon to refer certain issues to the People for their consideration, specifically when a question of constitutional amendment arises. Neither the Executive nor the Judiciary has the Constitutional authority to refer such an issue to the People – it is the sole purview of the Legislature.
7. No branch of Government can, by itself, amend the Constitution – only the People can. A proposed constitutional amendment can be proffered to the People by the Initiative Process, reserved in the Constitution and initiated by the people themselves, or by the Referendum Process, also reserved in the Constitution and initiated by the Legislature.
8. The duty of the Judiciary is to render an opinion in a case between litigants in accordance with the Constitution and the law. The Judiciary does not have the constitutional authority to make policy for the People of Montana – that is the proper role of the Legislature. For them to do so is a violation of Article III, Section 1.

9. Thus, I believe a Legislator is acting on his/her sworn duty to uphold and defend the Constitution of the United States and the State of Montana when voting yes on a referendum, including one which may conflict with a supreme court decision. The reason this is proper is because it is not the Supreme Court's opinion that makes something constitutional, it is the will of the people that makes something constitutional. Absent the expression of the will of the People – by a vote on an issue – the will of the People is not known. A Supreme Court 'ruling' on a legal dispute is, in fact, an OPINION by that Court and may be overturned by another Court. It is not a declaration of the People; and it is the People who are sole authors of Constitutional provisions (Art. II, Secs 1 & 2). (King George 'ruled', and we wanted to get away from that kind of 'rule')
10. I believe a Legislator is acting on his/her sworn duty to uphold and defend the Constitution of the United States and the State of Montana when voting yes to send the issue to the full Senate and to send the issue to the People. It is the Constitutional right of the Legislature to do so and the constitutional duty of the Legislator to vote on the issue.
11. Question: Would a Legislator not be fulfilling his sworn oath by not sending this issue to the People for their consideration? Does a Legislator's duty die when the Judiciary 'rules' a certain way? Would not Lincoln's concern then become manifested?
12. The US Supreme Court ruled in Roe v Wade (1973) that an unborn child was not a person. What was the basis of that ruling? – certainly not the Constitution for such an opinion is not expressed in the Constitution, nor even the language of the 14th Amendment. Whereas, the Declaration of Independence, our first great document, specifically states that: "*We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are Life...*". But even in light of such a 'Declaration' – a statement of a self-evident truth which was the very basis of the US becoming the US, some now believe that the Court's ruling in Roe is the constitutional policy of the People of the United States regarding unborn human beings. The Roe decision by the US Supreme Court IS NOT THE CONSTITUTIONAL PRINCIPLE of the People of the United States; IT IS AN OPINION of the USSC in 1973. Please read the excerpts from the USSC Webster opinion regarding the Roe opinion.
13. The US Supreme Court ruled in Dred Scott (1857) that a black man, a slave, had no standing in the Courts of the US, was not a human being, was not a person but was rather chattel property? What was the basis of that ruling? History has proven that Chief Justice Taney was prejudiced against black people and was pro-slavery. Was the Court correct in its opinion, or was it purposely bisased? It took a Civil War, an executive order unlike any other – the Emancipation Proclamation – and, within 3 years, the 13th and 14th Amendments to the US Constitution to undo the US Supreme Court's ruling in the Dred Scott decision. And in the 154 years since the Dred Scott decision, the US Supreme court has never admitting to that decision being flawed and dreadfully wrong
14. And if someone, a someone knew that the Court opinion was wrong, was a violation of a "self-evident truth", should not that person stand up and say the opinion is wrong? And if that person was a Legislator, sworn to defend the Constitution and the laws of the land, should not that Legislator do what is required of him/her in addressing that wrong? And if the People are the only ones who have the exclusive right to address such a wrong, and the Legislator has the

Constitutional right to refer the issue to the People for them to address and rectify, does not the sworn oath of the Legislator compel him/her to refer the issue to the People, perhaps even in disregard of his/her own opinion on the matter? Does not the Legislator have the right as member of "THE PEOPLE" to express his/her personal opinion on the issue at the polls, as does every other member?

I close in saying: Thank You for the work you do – the anguish over the difficult decisions you face – the time away from home, work, friends and family. I respect you all thoroughly and immensely. I pray God's wisdom and Blessings to each of you.

Very Sincerely Yours,

Dan McGee